IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 197 of 2005

HARJEET KAUR & ORS
V/S
STATE OF RAJ. & ANR

Mr. BS SANDHU for Mr. HS SANDHU, for the appellant / petitioner

Date of Order : 18.7.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

Heard learned counsel for the appellant.

The two learned courts below have dismissed the plaintiff's suit, which was filed for cancellation of the attachment, and injunction, seeking to restrain the respondents from auctioning the property, and for direction to allow the plaintiffs to enjoy the property uninterruptedly. According to the plaint averments some criminal litigation was initiated against Malkiat Singh, and in order to avoid arrest he absconded, and vide communication dt. 21.6.1986 and 10.12.1987 the property in question was attached, in accordance with the provisions of Section 82 and 83 of the Code of Criminal Procedure (Cr.P.C.). The further averments of the plaint are, that thereafter in the year 1989 Malkiat Singh died in an

encounter with the police. On these facts it is alleged, that on account of death of Malkiat singh, the attachment became meaningless, as no criminal proceeding could continue against him, and therefore the property is liable to be released, and the attachment is liable to be cancelled.

It is true, that the learned courts below have dismissed the suit on different grounds like, the trial court decided issue no.1, by holding, that it is not established on record by any documentary evidence, that Malkiat Singh has actually died, and if died when, and where. Likewise it is also found, that the plaintiffs have not obtained any succession certificate. It has also been found, that instead of filing the suit, the plaintiffs should have first approached the Court, which has ordered the attachment, and if after the order of release is passed the plaintiff does not get the property, then they could have filed the suit as heirs. Likewise, deciding issue no. 2 it was found, that the provisions of Section 84 and 85 Cr.P.C. are there for cancellation of attachment, and for claiming independent entitlement of the user of the property. It is alleged to be established by the plaintiffs, that they are the heirs of the deceased Malkiat Singh, and in absence of proof about that, they are not entitled to decree. Thus, the suit has been dismissed. In appeal the learned lower Appellate Court has found, that

from the F.I.R. Ex. 7, which is dt. 23.6.1988, and is written in Punjabi(GURUMUKHI), some part whereof is in English, but there from it is not clear as to who lodged it. However, therefrom it transpires, that Malkiat Singh was attempted to be apprehended, and in order to avoid arrest, he consumed cyanide poison, but then, it is not clear whether thereafter he died or survived. Then, it was found, that it is not established, that Malkiat Singh has died or survived. Thus, it was found, that it is not established that Malkiat Singh has died. Likewise, the plaintiffs have been found to have not proved to be heirs of the deceased, and thus the suit has been dismissed.

It is contended by the learned counsel for the appellant, that from a bare perusal of the F.I.R. Ex. 7, it is clear that the deceased died, and in any case, since the suit was filed on 31.10.1998, by that time more than seven years had expired since the deceased was not heard, and therefore, there is presumption of his death, and since in the written statement it was admitted, that the plaintiffs are heirs of the deceased Malkiat Singh, the finding recorded by the learned lower Appellate Court is required to be set aside, even in the second appellate jurisdiction. Then, referring to Section 84(4) Cr.P.C., it was contended, that even where the objections filed under Section 84(4) are dismissed, the person aggrieved can file regular civil suit within one year, in that view of the matter, when the

plaintiffs had directly filed the civil suit, it cannot be said that, that is barred.

I have considered the submissions.

The plaint was read to me, on my request. In my view, on a combined reading of the plaint and the provisions of Section 82, 83, 84, 85, and 86 of the Cr.P.C., it is more than clear, that the suit is wholly misconceived, and even the findings recorded by the learned courts below are wholly irrelevant, irrespective of the fact, as to whether they are correct or not.

A look at the provisions of Section 82 Cr.P.C. shows, that thereunder a proclamation is to issued. Then under Section 83 the property of the person proclaimed is to be attached. Then, according to Section 84, under sub-section 1, if any claim is preferred to, or objection made, to the attachment of any property attached under Section 83, within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under Section 83, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part. Then, sub-section 2 confers jurisdiction as to in which Court such objection is to be made. Then, sub-

section 3 authorises the Court to enquire, and sub-section 4 provides for remedy, in the event of objection being disallowed. Thus, in substance, the provisions of Section 84 are akin to provisions of O. 21 Rule 58 C.P.C., and the person objecting should have a claim to the property, adverse to that of the proclaimed person. In the present case, even a close reading of the plaint shows, that none of the plaintiffs are claiming adverse to the proclaimed person, but are claiming through the proclaimed person, on the ground, that since proclaimed person has died, the attachment has become meaningless.

In this sequence provisions of Section 85 Cr.P.C. are significant, which provide for release, sale and restoration of attached property. I think it appropriate to quote the provisions of Section 85, as such, which read as under:-

> "85.Release, sale and restoration of attached property- (1) if the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.
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> (2) If the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under s. 84 has been disposed of under that section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner; in either of which cases the Court may cause it to be sold whenever it thinks fit.

> (3) If, within two years from the date of the attachment, any person whose property is or has been at the disposal of the State Government, under sub-section (2), appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying therefrom all costs incurred in consequence of the attachment, be delivered to him."

Thus, a bare reading of Section 85 makes it clear, that under sub-section 1 the proclaimed person has a right to appear for releasing the property, and under sub-section 2 if the proclaimed person does not appear within the time specified, the property under attachment shall be at the disposal of the State Government. However, it is not to be sold until expiry of six months from the date of attachment, and until the objections filed under Section 84 are disposed of, unless it is subject to speedy and natural decay. Then, under sub-section 3, if within two years from the date of attachment, any person whose property is or has been at the disposal of the State Government appears voluntarily, or is apprehended and brought before the Court, by whose order the property was attached, or the Court to which such Court is subordinate, and proves certain facts mentioned therein, then the property can be

restored, or if it has been sold, the sale proceeds can be made over to him, after deducting the mentioned amounts.

In the present case, there is no averment on the side of the plaintiffs, that the proclaimed person either appeared voluntarily, or was apprehended, or was brought before the Court, and obviously, none of the circumstances required to be proved under sub-section (3) are even disclosed in the plaint. That being the position, per force of language of Section 85, the property could not be released, simply because at a subsequent point of time the proclaimed person died. Admittedly no action has been taken within the period specified in sub-section 3, while for the first time the suit has been filed in the year 1998.

In that view of the matter, to say the least, the suit was wholly misconceived, and the dismissal of the suit is upheld, though for different reasons. The appeal is, therefore, dismissed.

(N P GUPTA),J.

/Sushil/